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No. 499.

Brf. of Browne, Kahn & Britton for P. E.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

Filed April 17, 1900.

JOHN FITZPATRICK,
PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

No. 499.

In Error to the District Court of the United States for the District of Alaska.

BRIEF FOR PLAINTIFF IN ERROR.

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JULIUS KAHN,
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STATEMENT.

At the May Term, 1898, of the Court below, plaintiff in error was jointly indicted with Henry Brooks and William Corbett for the crime of murder. They were arraigned and severally demurred to the indictment (R. 5). Such demurrer was overruled and exception taken (R. 6), whereupon each defendant plead not guilty. Motions for continuance being made and denied (R. 15), Brooks and Corbett moved and obtained order for separate trials (R. 17), whereupon the United States Attorney moved, and the Court directed the trial of Fitzpatrick to then proceed, to be followed by the trial of Corbett (R. 17).

Upon trial of plaintiff in error, verdict of "guilty without "capital punishment" was rendered (R. 24). Motions for new trial and in arrest of judgment were entered, heard and overruled (R. 32, 33), and judgment thereupon entered (R. 32), sentencing him to imprisonment at hard labor at San Quentin, California, where he is now confined. To review such judgment this writ is prosecuted *in forma pauperis.*

Assignment of Errors.

These appear at large in the transcript (R. 105, 108). Thereon we submit.

ARGUMENT.

1.

Indictment Insufficient.

Defendant's demurrer thereto alleged (*inter alia*):

"That said indictment does not substantially conform "to the requirements of Chapter 8 of the Oregon Code of "Criminal Procedure applicable to this indictment."

This indictment is brought under Section 5339, U. S. Revised Statutes. That section does not define the crime of murder, but prescribes its punishment.

By Section 7 of the act approved May 17, 1884, "An "act providing a civil government for Alaska" (23 Stats. 24), it is provided—

"That the general laws of the State of Oregon, now in "force, are hereby declared to be the law in said district, "so far as the same may be applicable, and not in con-

" dict with the provisions of this act, or the laws of the " United States. * * * "

The sufficiency of this indictment must, therefore, be determined by the law of Oregon and the decisions of the highest Court of that State rendered thereon, as existing at the date of its adoption in Alaska, May 17, 1884, for it is well settled that the adoption of a statute in such form carries with it its settled judicial interpretation in the jurisdiction of its origin.

This has been directly ruled in *United States* v. *Clark* (46 Fed. Rep. 633), involving an indictment for murder in Alaska. Therein the Court ruled (syllabus):

" Revised Statutes U. S., Sec. 5339, providing for the " punishment of the crime of murder, having made no " provision as to the form of procedure, resort must be " had, in testing the sufficiency of an indictment for a " murder committed in Alaska, to the laws of Oregon in " force May 17, 1884, rather than to the rules of the " common law."

The Criminal Code of Oregon (1870, par. 1269) gives the statutory form of indictment for crimes. In the appendix thereto, the gravamen of an indictment for murder is stated thus:

" Purposely and of deliberate and premeditated malice, " killed C. D. by (shooting him with a gun or pistol, or " by administering to him poison, etc.) "

By Section 71 of the Oregon Criminal Code, it is provided that—

" The manner of stating the act constituting the crime, " as set forth in the appendix to this code, is sufficient in " all cases when the forms there given are applicable."

The indictment of Fitzpatrick, here involved (R. 1), *does not* conform to settled statutory requirement of the Oregon law. It wholly fails to aver, as a direct charge, the act of killing, as the statutory form of Oregon requires. Deliberate and premeditated malice is averred in assaulting the deceased, and likewise in discharging against him a loaded revolver, but there is no such charge of deliberate and premeditated malice in killing. This is an essential requirement in all jurisdictions where murder is made matter of statutory definition when the indictment therefor must, with exact precision, charge premeditated intent to kill, precisely as defined by the Oregon law.

The case at bar is hence fully within the general rule on this head, well stated in the Encyclopædia of Pleading and Practice, Vol. 10, Title, Homicide, p. 116, as follows:

> "It is almost universally the rule that in an indictment "for murder the purpose to kill must be specifically "averred as a part of the description of the offence. "Such purpose is an essential element of the statutory "crime, although not essential at common law"—

citing many authorities. *Inter alia*, *State* v. *Brown*, 21 Kan. 38, wherein it was held that where an indictment for murder charged that the defendant deliberately and premeditatedly committed an assault and battery upon the deceased by shooting him with a pistol loaded with gunpowder and leaden balls, and inflicted a mortal wound, from which mortal wound the deceased died, but did not anywhere charge that the defendant committed the assault and battery or did the shooting or killing with the deliberate and premeditated intention of killing the deceased, it was held that such indictment did not charge murder in the first degree.

So in *Schaffer* v. *State*, 22 Neb. 557, it was held that an averment that the accused "feloniously, purposely, "and of his deliberate and premeditated malice" did make an assault upon the deceased, and that he "did then "and there feloniously, purposely, and of his deliberate "malice," shoot the deceased with a gun loaded, etc., inflicting a mortal wound of which the deceased then and there died, does not satisfy the requirements of the law; for though the accused may have purposely and of deliberate and premeditated malice assaulted the deceased, and shot him, it does not follow that the shooting was with the design and purpose to produce death.

In *Wharton on Criminal Pleading and Practice*, Sec. 1063 (Sec. 1), the rule is stated thus:

"When the intent is to be proved, in order to indicate "the character of the act, as when there is an attempt or "assault, to commit an offence, in such cases the intent "must be averred *and must be attached to all the material* "*allegations.*"

In United States *v.* Clark, *supra*, this was done. The indictment there involved is set out in the report of the case, and distinctly charges that defendant "of deliberate "and premeditated malice killed" the deceased "by then "and there shooting him in the body with a double-"barrelled shot-gun."

That indictment was sustained by the Court because sufficient in form and substance under the Oregon Code. Comparison of the form of indictment in the case thus cited with that involved in the case at bar will clearly show the full sufficiency of the former and the fatal weakness of the latter in this regard.

In *Leonard* v. *Territory* (2 Washington Ty. 381) it was held (syllabus):

" An indictment is not sufficient to sustain a sentence " of murder in the first degree which charges the assault " and shooting to have been done purposely and of " deliberate and premeditated malice, but does not aver " the killing *itself* to have been done purposely and of " deliberate and premeditated malice, and only charges " manslaughter. The conclusion, 'And so the jurors do " 'say the said Andrew Leonard * * * feloniously, " 'purposely, and of deliberate and premeditated malice " ' * * * did kill and murder,' does not supply this " essential averment. The latter statement is but an " inference of the grand jury from their former statement, " which its language will not admit of" (the precise averment in the indictment at bar.)

In the case last cited the Court's decision observes :

" Our statute requires that to constitute such a murder " in the first degree as would consist, with the facts " charged in this indictment, the killing must have been " done purposely and of deliberate and premeditated " malice. Five or six States have statutes similar to, and " three or four others statutes almost identical, with our " own. So far as we are advised, the Supreme Courts of " all those States concur in holding that to bring a case " within the statute, the indictment must charge that the " killing itself was purposed and deliberate and premeditated malice. Oregon Criminal Code, Sec. 506 ; 7 Ore. " 198 ; 8 Ohio St. 109, 307 ; 10 Ohio St. 495 ; 54 Ind. " 135 ; 59 Ind. 105 ; Iowa Code, Sec. 4192 ; 4 Greene, " 500 ; 27 Iowa, 402 ; 24 Penn. St. 286 ; 83 Penn. St. " 131 ; 5 Mo. 379 ; 20 Mo. 58 ; 25 Mo. 326 ; 6 Mo. 24 ; " 8 Yerger, 534 ; 49 N. H. 369."

The Criminal Code of Oregon here applicable, provides that :

" If any person shall purposely and of deliberate malice " kill another, such person shall be deemed guilty of " murder in the first degree."

In *Wharton, supra*, Par. 163A, the rule is clearly stated that where intent is part of the statutory definition of the offence, it must be so averred.

In *Hagen* v. *State* (10 Ohio St. 459), it was held :

" Intent or purpose to kill is essential to constitute the " crime of murder in the first or second degree, as de- " fined by the statutes of Ohio ; and this intent must be " specifically and directly averred as part of the description " of the offence in every indictment for either of these " crimes. An averment that the accused ' purposely and " ' of deliberate and premeditated malice did strike ' the " deceased, thereby inflicting a mortal wound, of which " the deceased afterwards died, does not satisfy the re- " quirements of the law ; for, although the accused may " have purposely and maliciously struck the deceased, it " does not follow that the stroke was given with a design " to produce death."

This ruling has exact application to the case at bar, for the form of language used in the indictment there involved and held insufficient, is the exact form found in the indictment here under review.

In *State* v. *McCormick* (27 Iowa, 402), the Court, speaking by Chief Justice Dillon, said :

" The killing then, to make murder in the first degree " (and the kind of killing which was relied on below) " is one which is wilful, deliberate and premeditated " * * * ; The indictment does indeed charge that the " assault was wilful, deliberate, and premeditated ; that " the blow was dealt purposely with premeditation ; but " it does not charge that it was thus dealt for the purpose " or with the intent to kill, or that the killing, the taking " of the life of the deceased was wilful, deliberate, and " premeditated. It needs no argument to show that an " assault may be wilful, deliberate, and premeditated " without there being any intent whatever on the part of " the assailant to kill or take the life of the person

" assaulted. And it is just here that the indictment con-
" sidered as one charging murder in the first degree is
" defective. This appears from the statute which is that
" 'the killing,' and not simply the assault, must be wilful,
" deliberate, and premeditated, in order to constitute
" murder in the first degree."

In *Commonwealth* v. *Boynton* (12 Cush. 499), it was held:

"It is a familiar rule of criminal pleading that wherever
" the intention of the party is necessary to constitute an
" offence, such intention must be alleged in every material
" part of the description when it so constitutes it."

In *State* v. *Young* (55 Kansas, 349), it was held:

" In Ohio they have a statute similar to ours, which
" provides that 'if any person shall, purposely and malic-
" 'iously, but without deliberation and premeditation,
" 'kill another, every such person shall be guilty of
" 'murder in the second degree, and on conviction thereof
" 'shall be imprisoned in the penitentiary and kept at
" 'hard labor during life.' In interpreting their statute,
" the Supreme Court of that State held that the intent or
" purpose to kill, although not essential to constitute
" murder at common law, was made one of the ingredients
" of the crime of murder by the statute of Ohio, and that
" to convict of murder in the second degree the State
" must allege and prove a purpose or intent to kill.
" Fouts *v.* State, 8 Ohio St. 98; Robbins *v.* State, *ib.*
" 131; Jones *v.* State (Ohio), 38 N. E. 79.

" We think this the correct view of the statute, and
" the manner in which homicides are graduated by the
" Statute, tends to confirm the interpretation * * *
" This qualification clearly makes the purpose to kill an
" essential ingredient of murder in the second degree."

And under similar statutory provisions, like rule is declared in—

Jewell v. *Territory* (*Okla.*), 43 Pac. 1,075;
Holt v. *Territory* (*Okla.*), 43 Pac. 1,083;
Wright v. *Territory* (*Okla.*), 47 Pac. 1,069;
Stover v. *Territory* (*Okla.*), 49 Pac. 1,009.

In examining this question we must necessarily resort to the State statutes and State authorities based thereon. There are no common law offences against the United States, and the adoption of the laws of Oregon in this regard in the District of Alaska, necessarily brings into review the law of that State, and similar laws of other States, relating to the same subject, as well as their judicial interpretation. The foregoing authorities are culled from many to like effect. Cumulative citation is unnecessary, because unduly extending this brief.

The Federal cases stand in entire harmony with foregoing State authorities on this head. Thus, in *Evans* v. *United States* (153 U. S. 584, 593), it was said:

"Where, however, the statute uses words which are "not absolutely inconsistent with an honest purpose, such "as was held by this Court in Britton's case (108 U. S. "193), were the words 'wilfully misapplied,' *the allegation "of an intent to defraud becomes material in the highest "degree.* In fact, the gravamen of the offence consists "in the evil design with which the misapplication is made, "and a count which should omit the words 'wilfully,' "etc., and '*with intent* to defraud' *would be clearly "bad.* * * * "

"*Where the intent is a material ingredient of the crime "it is necessary to be averred;* but it may always be "averred in general terms, as in a case of assault with "intent to kill. So in an indictment for murder, it is "necessary to aver that the killing was done wilfully, "feloniously, and of malice aforethought." * * *

" This subject, however, was so fully considered by this " Court in United States *v.* Simmons, 96 U. S. 360, 364, " that it is needless to dwell upon it more at length here."

In *United States* v. *Cruikshank et al.* (92 U. S. 542, 557), the Court said :

"In criminal cases, prosecuted under the laws of the " United States, the accused has the constitutional right " ' to be informed of the nature and cause of the accusa- " ' tion.' Amend. VI. In United States *v.* Mills, 7 Pet. " 142, this was construed to mean that the indictment " must set forth the offence 'with clearness and all neces- " ' sary certainty, to apprise the accused of the crime with " ' which he stands charged'; and in United States *v.* Cook, " 17 Wall. 174, that 'every ingredient of which the offence " ' is composed must be accurately and clearly alleged.' " It is an elementary principle of criminal pleading, that " where the definition of an offence, whether it be at com- " mon law or by statute, 'includes generic terms, it is not " ' sufficient that the indictment shall charge the offence " ' in the same generic terms as in the definition, but it " ' must state the species—it must descend to particulars.' " 1 Arch. Cr. Pr. and Pl. 291. The object of the indict- " ment is, first, to furnish the accused with such a descrip- " tion of the charge against him as will enable him to " make his defence, and avail himself of his conviction or " acquittal for protection against a further prosecution " for the same cause, and, second, to inform the Court of " the facts alleged, so that it may decide whether they are " sufficient in law to support a conviction, if one should " be had. For this, facts are to be stated, not conclu- " sions of law alone. *A crime is made up of acts and in- " tent, and these must be set forth in the indictment* with " reasonable particularity of time, place, and circum- " stances."

These authorities stand in entire harmony with the State cases cited, *supra*. Tested by them all, it is manifest that the indictment in the case at bar is fatally defective in

failing to charge the crime of killing *eo nomine*, or as done with deliberate malice. The defendant was called to plead to the charge of assaulting and shooting, but the indictment wholly fails to charge premeditated intent to *kill*, and is hence fatally defective.

II.

ERROR IN ADMITTING IN EVIDENCE ACTS AND DECLARATIONS OF CO-DEFENDANT CORBETT, NOT OCCURRING IN THE PRESENCE OF FITZPATRICK.

In the charge to the jury the Court (*inter alia*) said (R. 22):

"It is the theory of the prosecution that the defendants, "John Fitzpatrick, and Henry Brooks, and William Cor- "bett, were jointly engaged in an unlawful attempt to rob "the deceased, Samuel Roberts. If you find from the "evidence, beyond a reasonable doubt, that the defend- "ant, John Fitzpatrick, and the said Brooks and Cor- "bett, had conspired to rob the deceased, and were actu- "ally engaged in the attempt to commit such robbery, "and you shall further find that in attempting to carry "out such unlawful object, any one of the defendants "shot and killed the deceased, then the defendant, John "Fitzpatrick, is guilty. If any two or more persons con- "spire to do an unlawful act, and death happens in the "prosecution of the common object, all are alike guilty "of homicide."

The indictment does not charge an attempt or conspiracy to commit robbery, with killing of the deceased as the result thereof. No mention is made therein of a conspiracy to rob Roberts.

The only witness produced by the Government, who was present when the deceased met his death, was one

Ross, whose testimony appears in the Record (pp. 45–55). On direct examination (pp. 45–46) he gives his narrative of the events which occurred thereat.

Thereafter the Government introduced one Philip Ballard (R. 66), a soldier on guard duty at Dyea, on the night of the occurrence, who testified that about two o'clock on the morning of March 13, he heard four or five pistol shots in a southerly direction, and from where, he has since learned, the location of Roberts' cabin and the Wonder saloon to be, and that some fifteen or twenty minutes, or half an hour thereafter "a man came to me; "I was in the cabin and he rapped at the door, and I "went to open the door for him, and he said he would "like to get a doctor; he was shot." * * * "I "directed him to the hospital in town and he went that "way."

Over the objection of defendant's counsel, this witness was asked and answered that he did not know the man, but was afterwards told that his name was Corbett. Corbett was brought into Court, but witness could not identify him with certainty. All of this testimony, with respect to such identification, was objected to, and is set forth at length in the bill of exceptions, which then recites (R. 37):

"Whereupon counsel for the defendant moved to "strike out all of the testimony of the witness Ballard, on "the ground that it does not contribute in any manner "to the identification or guilt of Fitzpatrick then on "trial, which motion was overruled and exception taken "by the defendant and allowed."

The Government also summoned one Doctor T. L. Price, who testified (R. 69) that about three o'clock on the morning of March 13, 1898, William Corbett applied to him for medical assistance; that Corbett was wounded

in the right shoulder and witness was in attendance upon him three weeks or a month. Thereupon defendant's counsel moved to strike out all of this testimony of witness Price "on the ground that it does not affect the de- "fendant on trial." The motion was denied and exception taken. This objection is also fully preserved in the bill of exceptions. (R. 37.)

The Government also introduced the testimony of John Cudihee, U. S. Deputy Marshal of Dyea, who produced in court two pairs of shoes, testifying that one pair was Corbett's and one pair Fitzpatrick's. To this testimony, defendant's counsel objected, because the articles had not been sufficiently identified, and on the further ground "that any testimony relating to Corbett was improper and "irrelevant on the trial of this defendant. * * *", This objection was overruled and exception taken. (R. 38.)

Over the objection of the defendant's counsel, this witness was further allowed to testify that he took Corbett's shoe and fitted it into the impression in the sand around the Roberts' cabin, where the shooting occurred. Again defendant's counsel objected and moved to strike out all the testimony of this witness in reference to Corbett's shoes "on the ground that it cannot affect the guilt or "innocence of the defendant now on trial, which motion "was denied and exception taken by defendant and "allowed." (R. 38.)

These matters are grouped for convenience of argument. Thereon we submit—

It was manifest error to admit *any* testimony relating to the acts of Corbett and especially those which occurred after the alleged crime had been committed. No direct testimony appears in the record showing the presence of Corbett at the cabin before, during, or after commission

of the crime for which defendant Fitzpatrick was then on trial. Upon the theory of a conspiracy indulged by the Government, as expressed in the Court's charge *supra*, Fitzpatrick manifestly could not be affected upon the issue of his guilt or innocence, by testimony relating to Corbett affecting his acts, done without Fitzpatrick's presence, and especially after the commission of the alleged offence. *Corbett was not then on trial;* was not offered as a witness by the Government, nor brought by the entire testimony of record in this cause into any direct relation with Fitzpatrick, in connection with the crime for which the latter was then on trial. All the testimony relating to Corbett and to his acts or declarations, was hence inadmissible and the proper subject of exceptions. Whether exclusion thereof from the case would or would not have so affected the jury as to have produced a different verdict, is not material. If the evidence was improperly admitted, it went to the jury as part of the Government's case, and its admission by the Court was sufficient to justify the full belief by the jury that such testimony was material as bearing on the guilt or innocence of Fitzpatrick. If the defendants had been tried jointly, some of the evidence now objected to might have then been admissible, in so far as same did not concern acts and declarations of Corbett, made without the presence of his co-defendant, for the jury could have found one guilty and acquitted the other. When the Court permitted severance, and compelled Fitzpatrick to go to trial, none of the evidence objected to with respect to Corbett was admissible against him.

The manifest purpose of the testimony of Ballard, as offered, was to show that shortly after he heard four or five pistol shots come from the direction of the Roberts' cabin, a man, then unknown to him, rapped at his cabin

door and told him "he would like to get a doctor, he was "shot."

Whilst this was not an admission by Corbett of the circumstances under which he had been shot, the connection in which the testimony was used by the Government was so intended, and did, in legal effect, operate upon the jury as connecting Corbett and Fitzpatrick with the crime for which defendant Fitzpatrick was then alone upon trial. It is the *use* thus made of Corbett's act or declaration which properly made the statement of the witness inadmissible against Fitzpatrick.

Viewed in this necessary light, we submit the testimony of the witness Ballard was inadmissible against Fitzpatrick, upon clear analogy to the principle announced in *Sparf and Hansen* v. *United States* (156 U. S. 51). In that case declarations of Hansen connecting Sparf with the homicide there involved tending to prove the guilt of both, and made in the absence of Sparf, were held inadmissible against the latter. *It happened* that both defendants were jointly under trial in that case, but the Court observes (p. 58), "If Sparf had been tried alone a "general objection in his behalf, on the ground of incom- "petency, would have been sufficiently definite."

The principle thus affirmed has clear application to the case at bar, for, while in the case cited, the declarations of a co-defendant implicating the other, and made in his absence, were thus held inadmissible, it is equally plain that acts and utterances of co-defendant Corbett, done in the absence of Fitzpatrick, cannot be held admissible evidence against Fitzpatrick since they were obviously introduced by the prosecution for the purpose of connecting Fitzpatrick with the crime for which he was then under trial alone.

Moreover, as in the Sparf and Hansen case, the criminal

act had been committed and the conspiracy assumed upon the Government's theory of the case (whether existing in fact or at any time) had come to a complete end. Nothing that Corbett could thereafter do or say which would tend to connect Fitzpatrick with the crime, and which was not done or said in the presence of Fitzpatrick, could or should, upon plainest principles of justice, be held admissible evidence against Fitzpatrick on the trial of the indicted parties, whether held jointly or separately. The authorities cited in Sparf and Hansen *supra*, so clearly hold this to be the law, that we need not extend this brief with further citation thereof.

Equally incompetent was the evidence sought to be wrung from witness Ballard, to compel him to identify Corbett, by subsequent inquiry, as the party who had applied to him on the night of the homicide, with the declaration that he had been shot, and seeking his aid in obtaining a doctor. The same objection applies to the testimony of Doctor Price, who was permitted to testify that on the morning of the homicide he had been called upon to attend Corbett; had found him wounded, and had thereafter attended him for some three weeks or a month.

While all of this could be perfectly true, it had no place in relation to this case or to the crime alleged, for which Fitzpatrick was then alone on trial. It all went to the jury as having important relation to Fitzpatrick's guilt or innocence, when, in truth, it was wholly irrelevant and incompetent against him.

All of this irrelevant testimony was given added effect by like error in admitting the testimony of deputy marshal Cudihee, who testified to fitting Corbett's shoe to the sand prints about the Roberts' cabin where the homicide occurred.

It is plain that the Government's case proceeded upon one theory, while its evidence fell entirely short thereof. There was neither in the indictment nor in the proof any evidence of conspiracy to rob, nor would such evidence have been admissible upon the indictment as framed. The fact of the killing and the presence of Fitzpatrick were *the* matters to which relevant evidence could be properly addressed. The error of the Court arose in assuming the Government's theory and allowing proof to be introduced with reference to Corbett's acts and declarations which did *not* in any manner connect Fitzpatrick therewith. All of this combined evidence with respect to Corbett, when viewed in the light of the express declaration of the Court in its charge to the jury, as to the theory of the Government in assuming a conspiracy to rob, could have had but one effect, namely, to impress upon the jury as material and relevant testimony against Fitzpatrick the evidence introduced as to Corbett's acts after the commission of the offence, and which, on obvious principle, was inadmissible against Fitzpatrick. The cumulative effect of this evidence with respect to Corbett, and relating to acts and occurrences with which Fitzpatrick had manifestly nothing to do, and which occurred without his presence, cannot, on any possible ground, be held as harmless error. Its effect was direct, positive, and in highest degree injurious to him.

Upon the Government's own theory of a conspiracy to rob, or even to commit murder (which the charge of the Court to the jury stated in express terms), the testimony relating to Corbett was inadmissible.

For whilst (with abundant citation of authority) the rule is well stated in *American and English Encyclopædia of Law*, 2d Edition, Title, Conspiracy, page 866—

"When the fact of a conspiracy has been proved or "established by reasonable inference, the acts and declara- "tions of one conspirator in furtherance of, or made with "reference to, the common design, are admissible in evi- "dence against his associates,"

the further qualification is immediately expressed (p. 868) that—

"Until the conspiracy is found *aliunde*, the acts and "declarations of an alleged conspirator are inadmissible "to establish the connection with the conspiracy, of one "charged as a co-conspirator."

In present case such evidence of conspiracy is wholly lacking. We are hence unable to find any possible ground, either upon the Government's theory of the case, or otherwise, which can justify the admission of testimony as against Fitzpatrick, which relates alone and wholly to Corbett, and whether that evidence is addressed either to Corbett's own acts and declarations, or to the testimony of others in relation thereto, its introduction over objections necessarily impressed the jury to Fitzpatrick's prejudice.

III.

Error in Permitting Unrestricted Cross-Examination of Plaintiff in Error.

As shown by the bill of exceptions (R. 38–39) the direct testimony of Fitzpatrick was as follows:

"Q. Can you tell the jury where you were on the night "of the 12th of March, from about eleven o'clock in the "evening until the next morning?

"A. I was up between Clancy's and Kennedy's; I had "been in Clancy's up to about half past twelve or one "o'clock—about one o'clock, I guess. I went up to Ken- "nedy's and had a few drinks with Captain Wallace and

"Billy Kennedy, and I told them I was getting kind of "full and I was going home, and along about a quarter "past one Wallace brought me down as far as Clancy's, "and then he took me down to the cabin and left me in "the cabin, and we wound the alarm clock and set it to "go off at six o'clock; and I took off my shoes and laid "down on the bunk, and woke up at six o'clock in the "morning and went up the street.

"Q. Now, is the Kennedy and Wallace that you refer "to the witnesses that are mentioned in the affidavit of "Corbett and Brooks for a continuance; you heard the "affidavit read?

"A. Yes, sir."

On cross-examination the Government was permitted, over objection by defendant's counsel, to propound questions which went far outside the facts testified to by Fitzpatrick on his examination-in-chief. These interrogatories, with the objections and exceptions taken to each, appear at length in the bill of exceptions (R. 39, 40). They related to the witness' attire on the night of the shooting; to his acquaintance with Corbett; whether Corbett had shoes of a certain kind, and whether witness saw Corbett on the evening of March 12th, the night preceding the shooting, and whether Corbett roomed with Fitzpatrick in the latter's cabin, and whether the witness saw anyone else in the cabin besides Brooks and Corbett.

None of these questions had any relation whatever to Fitzpatrick's testimony on direct examination. They were asked in connection with testimony which had been given by other witnesses for the Government, and were evidently so asked for the purpose of corroborating and sustaining the Government's case. In this there was manifest error.

In Amer. and Eng. Ency. of Law, Vol. 29, Title, Witness, p. 669, the rule is well stated as follows:

"There is eminent authority to the effect that the ac-
" cused may, in his direct examination, stop at any point
" he chooses, and that his constitutional privilege pro-
" tects him from cross-examination on any point not
" touched upon in his examination-in-chief. And in a
" number of jurisdictions it has been provided by stat-
" ute or settled by judicial determination that the cross-
" examination of the accused shall be confined to the
" matters concerning which he testified in his direct
" examination."

The foot-note following this statement recites that—

" This rule has been adopted in Oregon. See State *v.*
" Lurch, 12 Ore. 99; State *v.* Bacon, 13 Ore. 143; 57
" Amer. Rep. 8; State *v.* Gallon, 18 Ore. 425."

To the same effect are Judge Cooley's observations as given in his work on *Constitutional Limitations*, 6th Ed., 384, 386, thus:

" If he does testify, he is at liberty to stop at any point
" he chooses, and it must be left to the jury to give a
" statement, should he decline to make a full one, such
" weight as under the circumstances they think it entitled
" to, otherwise the statutes must have set aside the Con-
" stitutional maxim which protects an accused party
" against being compelled to testify against himself, and
" the statutory privilege becomes a snare and a danger."

In State *v.* Lurch, *supra* (12 Ore. 99), the Court said:

" The statute of the State which allows the accused in
" such a case to be a witness, provides that when he offers
" his testimony as a witness in his own behalf, he shall
" be deemed to have given to the prosecution a right to
" cross-examine him upon all facts to which he has testi-
" fied, tending to his conviction and acquittal (Laws, pp.
" 28, 29). But this does not compel him to be a witness
" against himself beyond such cross-examination. The

"humane principle of the law that a party shall not be "compelled to be a witness against himself otherwise re- "mains in full force, and is as effectually violated when "the cross-examination of the accused is extended be- "yond the facts to which he has testified, as it would be "if he were to be called and made to testify at the in- "stance of the State. The object and purpose of the "statute referred to were to afford an opportunity to the "accused to relate his account of the transaction in "which he is alleged to be implicated, and it would be a "great violation of good faith to permit the State to take "advantage of his situation and change the trial into an "inquisition. The cross-examination in such cases must "be strictly confined to the facts testified to by the ac- "cused. The law throws around him in such case an "immunity which ought to be sacredly maintained. "* * * Where the error consists of an infraction of a "constitutional guaranty in favor of personal liberty, "such as the compelling the party accused of a crime to be "a witness against himself, the law will presume an in- "jury, and the courts have no alternative but to adjudge "accordingly."

In *State* v. *Saunders* (14 Ore. 300), the same rule is affirmed and well stated by the syllabus, thus:

"Under the statute of this State allowing the accused "party to become a witness in his own behalf (Laws, 1880, "p. 28), it is error to compel him on cross-examination "to answer as to any facts not testified to on his direct "examination."

The statutory rule as thus expounded in Oregon, as shown by the cases cited from that State, has full application in Alaska where the criminal laws of Oregon were extended by the act of Congress of May, 1884, as shown, *supra*. For it must be true that with the adoption of the laws of Oregon, *eo nomine* in the district of Alaska, the judicial interpretation of those laws by the highest Court

of Oregon went with them to that district. We have here, therefore, as plainly controlling the case at bar, (1) the express statute of Oregon, and (2) its controlling judicial interpretation in that State, as demonstrating the error here complained of in allowing the cross-examination of Fitzpatrick to extend far beyond the testimony given by him in chief.

The plaintiff in error suffered under peculiar hardship in this regard. He stood alone upon his defence in Court, and was denied a continuance to enable the parties named in his examination-in-chief, with whom he stated he had passed the time until they took him to his cabin, to be summoned to Sitka to attend the trial. (R. 13.) The matters on which he was thus cross-examined, as disclosed by the bill of exceptions, were wholly foreign in detail and in effect to the facts testified to by him on his direct examination. All that he sought to do on his direct examination was to account for his whereabouts during the night and the hours of the morning preceding and following the shooting for which he was upon trial; they in no manner related to the clothes he wore; to his acquaintance with Corbett; to the latter's whereabouts, or to other details admitted as matter of cross-examination over the objection of his counsel. As stated above, all of such cross-examination was plainly addressed to an effort on the part of the Government to *compel* Fitzpatrick to admit or deny the statements made by other witnesses for the Government who had already testified before the jury. No case can hence be imagined where the wrong and injustice accomplished by this erroneous latitude of cross-examination could more clearly appear. Standing on trial for his life; denied any postponement to enable witnesses to be summoned in his defence, he was compelled to take the stand or remain mute. The simple narrative of his

whereabouts and doings on the night preceding and the hours of the morning following the shooting is all that he attempted to give. Wandering far away from that simple narrative the Government was permitted to cross-examine him at length upon matters and details which could have no possible relation to these simple facts as to his whereabouts, which he had alone given in his direct examination. In effect he was asked to affirm the testimony theretofore presented by the Government to the jury on these outside matters.

Witness Doll (R. 74), introduced for the Government, had undertaken to identify Fitzpatrick and give his attire, as he alleges he saw him at the door of the Roberts' cabin an hour or two before the shooting occurred. In cross-examining Fitzpatrick the Government plainly sought to compel him to incriminate himself in corroborating the testimony of Doll in this vital particular. We submit that the constitutional guaranty of protection extended to Fitzpatrick was plainly violated, and against a man who stood alone and deprived of all opportunity to produce witnesses in his defence in meeting a charge which involved his own life. As showing the wide range of cross-examination upon matters wholly foreign to Fitzpatrick's direct examination, we quote from the assignment of errors (R. 107) as follows:

"The foregoing being all the testimony of the said wit-
" ness in his examination-in-chief, the Court erred in
" permitting said witness to testify upon cross-examina-
" tion and admitting under such examination the follow-
" ing evidence: Anything concerning who roomed with
" the witness in the cabin; whether the defendant wore
" boots or shoes that night; whether he wore that night
" the same suit of clothes he had on in Court; what kind
" of a suit he did have on; whether he wore that night

" the same hat he then had in Court; whether he had a " fur cap also; whether at the time of the homicide the " witness had a mackinaw suit with a large belt and " buckle; what business the witness was engaged in for " Wilson and Kennedy; what sort of clothes he had been " wearing a week or two previous to the homicide; " whether or not he had a pair of rubber boots; how " long he had known William Corbett; whether or not " Corbett had a pair of shoes with nails in the bottom of " them; when he first saw Corbett on the 13th of March, " 1898; whether he saw him on the evening of the twelfth " of March, 1898; whether he remembered what kind of " shoes he had on that evening; whether anybody else " was in the cabin with defendant besides Brooks and " Corbett; all of which testimony was admitted under " defendant's objection."

IV.

There was likewise plain error duly reserved in the bill of exceptions (R. 41), in permitting the Government, in *rebuttal* to call and examine witnesses upon the effect of a pistol shot, as giving light sufficient to enable identification thereby.

No testimony on this point was introduced by the defendant. It was a part of the Government's opening, if admissible or material at all. The shooting occurred in the dark; identification of the accused then on trial, as the party who committed the act, was *the* foundation of the Government's case.

When the Government rested and the defendant submitted no testimony whatever in any manner relating to such a subject, it was manifest error to permit the Government to again enter upon its main case, by way of rebuttal, and leave these last impressions upon the jury, in this regard and on this important subject in its relation

to the case, without any opportunity whatever to the defendant to meet such testimony.

V.

It is further assigned as error that the Court erred in qualifying the instruction No. 1, given at defendant's request, with respect to the necessity of proof of conspiracy or common design, in the following language:

"Unless you shall find, beyond a reasonable doubt, that "the defendant wantonly shot and killed deceased with- "out excuse or justification." (R. 41.)

This qualification went far beyond the indictment and the charge made thereby. If Fitzpatrick had been indicted alone, the instruction might have been admitted, but when the Government's own theory, both in indictment and trial, rested upon a conspiracy, it was manifest error to inject therein a new and totally different factor, and to so instruct the jury as against Fitzpatrick alone, that irrespective of the charge as laid in the indictment and *any* proof of conspiracy in connection therewith, defendant could be, under such circumstances, tried alone and convicted of murder upon such wholly different ground.

We submit the judgment should be reversed and new trial awarded.

Respectfully submitted.

A. B. BROWNE,
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Atty's for Plaintiff in Error.

MAY 8 1900
JAMES H. McKENNEY,
Clerk.

No. 499. IN THE

Supreme Court of the United States.

Sup. Ct. of Browne, Kahn & Brit

OCTOBER TERM, 1899.

for P. E.

JOHN FITZPATRICK,
PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

Filed May 8, 1900. No. 499.

In Error to the District Court of the United States for the District of Alaska.

Supplemental Brief for Plaintiff in Error. In re Jurisdiction.

A. B. BROWNE,
JULIUS KAHN,
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Attorneys for Plaintiff in Error.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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In Error to the District Court of the United States for the District of Alaska.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

IN RE JURISDICTION.

Plaintiff in error was indicted, tried and convicted for the crime of murder. Pursuant to the Act of January 15, 1897 (29 Stats., 487) the jury qualified the verdict with the words "without capital punishment."

By permission of the Court the cause was submitted for the plaintiff in error on April 30 with leave to the

Solicitor-General to file brief for the Government within one week. We could not ask at this stage of the term for further time wherein to make reply thereto. The Government's counsel orally suggests to us, however, that the Court is without jurisdiction to review the sentence and judgment herein, because the plaintiff in error has not been convicted "of a capital crime," and which is alone reviewable here since the passage of the Act of January 20, 1897 (29 Stats., 492). We cannot permit the suggestion to go without answer, and hence beg to submit that such view is erroneous, because—

I.

The Act of March 3, 1891 (Sec. 5), gives direct appeal or writ of error from the District or Circuit Courts (*inter alia*)

"In cases of conviction of a capital or otherwise in-
"famous crime."

The crime of murder in the first degree is punishable by the law of Oregon (applicable here), and by Section 5339, U. S. Revised Statutes, by infliction of the death penalty. The power given the jury under the Act of January 15, 1897, *supra*, to qualify the verdict of guilty with the words "without capital punishment," does not make the *crime* any the less capital in every legal sense. The test is not the punishment which *is* imposed, but which *may be* imposed.

Such legal effect is imputed by this Court to the Act of March 3, 1891 (and the jurisdiction conferred thereby upon this Court), in the cause entitled, "*In re, Claasen*" (140 U. S. 200–204), wherein the Court said:

"We are of opinion that the Act of March 3, 1891, went "into immediate operation, so as to permit a writ of error "to be allowed in the present case, as the final judgment "against the defendant, by his sentence, was not rendered "until March 18, 1891. The case was one of conviction "of an 'infamous crime,' within the meaning of the Act, "as those words have been heretofore interpreted by this "Court. It was held in *Ex parte Wilson*, 114 U. S. 417, "that a crime punishable by imprisonment for a term of "years at hard labor is an infamous crime, within the "meaning of the Fifth Amendment to the Constitution of "the United States. See also *Mackin* v. *United States*, "117 U. S. 248; *Parkinson* v. *United States*, 121 U. S. "281; *United States* v. *De Walt*, 128 U. S. 393; *Medley*, "*Petitioner*, 134 U. S. 160, 169; and *In re Mills*, 135 U. "S. 263, 267. The purport of the rulings in those cases "is, that a crime which is punishable by imprisonment "in the State prison or penitentiary, as is the crime of "which the defendant was convicted, is an infamous "crime, whether the accused is or is not sentenced or put "to hard labor; and that, in determining whether the "crime is infamous, the question is, whether it is one for "which the statute authorizes the Court to award an in-"famous punishment, and not whether the punishment "ultimately awarded is an infamous one. So it is clear "that the crime in the present case is an infamous crime, "although it does not appear that Section 5209, or the "sentence imposed, expressly provided for imprisonment "at hard labor."

This rule is reaffirmed in *Logan* v. *United States* (144 U. S. 263, 308).

By clear analogy, it is plain that as murder is a capital offence, which may be punishable with death, the jurisdiction of this Court hence remains to review such conviction even with a life sentence (under the verdict of the jury) so imposed. And if, upon review of such record in an appellate Court, the sentence and judgment were reversed and the plaintiff in error again put upon trial, it

is manifest that he could then be found guilty without qualification and suffer the death penalty. This demonstrates that he has in law been convicted of a capital crime. It is certainly not an "otherwise infamous crime."

II.

The plain and natural reading of the Act of January 20, 1897, *supra*, leads to the same conclusion. That Act is as follows:

"That so much of section five of the Act entitled 'An " 'Act to establish Circuit Courts of Appeals and to de- " 'fine and regulate in certain cases the jurisdiction of " 'the courts of the United States, and for other pur- " 'poses,' approved March third, eighteen hundred and " ninety-one, as reads 'in cases of conviction of a capital " 'or otherwise infamous crime,' be amended by striking " out the words 'or otherwise infamous,' so that the same " will read 'in cases of conviction of a capital crime'; and " that appeals or writs of error may be taken from the " District Courts or Circuit Courts to the proper Circuit " Court of Appeals in cases of conviction of an infa- " mous crime not capital. * * *"

It is plain therefrom that the Circuit Courts of Appeals are given jurisdiction by way of review only "in cases of " conviction of an infamous *crime, not* capital." Or, in other words, of such crimes as *cannot* be punished by infliction of the death penalty. Murder in the first degree is, under the law applicable here, a capital crime, and its classification as such cannot be altered nor changed by the circumstance that in some particular case the jury has qualified its verdict by relieving from capital punishment.

It hence results that all cases wherein the punishment of death may be inflicted are reserved to the exclusive

jurisdiction of this Court on review. Otherwise, the singular result would obtain that conviction of murder, with life imprisonment as the penalty, could be reviewed only in the Circuit Courts of Appeals. If reversed there, and upon new trial the defendant be found guilty and sentenced to death, the record of his second trial and conviction could only then be reviewed in this Court. Congress plainly did not intend to thus shift the jurisdiction by the test of actual punishment imposed rather than by the definition of the crime. The plain reading of the statute forbids such conclusion.

III.

It is scarcely necessary to suggest that the Act of January 15, 1897, *supra*, did not change existing law so as to make murder, as a crime, any the less a capital offence. The act is correctly construed by the Court of Appeals of the District of Columbia, in *Fearson* v. *United States* (10 App. D. C. 536, 542) thus:

"There is no pretence anywhere in the Act of January "15, 1897, either express or by implication, to provide a "penalty for the crime of murder different from the pre- "vious penalty in any case whatever except where the "jury has rendered a qualified verdict. For that event "and for that event alone, the act provides, so far as the "two sections cited are concerned; and we fail to find "any inconsistency whatever between the provisions of "the statute in that regard, and the continued force and "operation of previous statutes providing for other and "entirely different contingencies. We are satisfied that "the Act of January 15, 1897, is limited, and was in- "tended by Congress to be limited, so as not to repeal or "in any manner to affect previously existing law beyond "its provision to allow the jury, upon a trial for the of-

" fence of murder, to determine by its verdict whether the " sentence should be that of death or that of imprison- " ment for life. We think that, so far from its provisions " being inconsistent with the continued operation of " other statutes providing for the imposition of the pen- " alty of death, they would be unintelligible and unreas- " onable in the absence of those statutes."

We submit this Court has full jurisdiction to hear and determine this cause upon the pending writ.

Respectfully submitted.

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